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KEVIN NATHANIEL FOX
U.S. MAGISTRATE JUDGE

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MEMO ENDORSED

June 25, 2008

BY HAND

Honorable Kevin Nathaniel Fox
United States Magistrate Judge
Southern District of New York
500 Pearl Street
New York, NY 10007

Re: Chandler v. City of New York, et al., 07 CV 10412 (PAC)(KNF)

Dear Magistrate Judge Fox:

I am an Assistant Corporation Counsel in the Special Federal Litigation Division of the New York City Law Department and the attorney for defendants the City of New York (“City”), the New York City Police Department (“NYPD”), Police Officer Joseph Gallagher and Police Officer Patricia Lezcano in the above-referenced matter.¹ I am writing to respond to the Court’s Order dated June 23, 2008, which notes that the time for defendants to respond to the amended complaint has elapsed. With sincere apologies to the Court and to plaintiff, defendants respectfully request that the Court grant defendants leave to file the enclosed Answer to the amended complaint.

By way of background, plaintiff filed the original complaint in this action on or about November 19, 2007. Pursuant to the November 19, 2007 Order of the Honorable Kimba M. Wood, plaintiff filed an amended complaint on January 3, 2008, alleging *inter alia*, that he had been subjected to excessive force by New York City police officers during his February 17, 2005 arrest. By letters dated April 21, 2008 and May 14, 2008, defendants City, NYPD, Gallagher and Lezcano requested that their time to respond to the amended complaint be enlarged to June 6, 2008. These requests were granted by the Court by Endorsements dated April 22, 2008 and May 15, 2008, respectively.

An Answer to the amended complaint was prepared by the undersigned to be timely filed. However, it appears that the answer in this action was inadvertently not filed with the Court due solely to my oversight. I respectfully note that I was out of the office during business hours June 2, 2008 through June 6, 2008 while attending a mandatory trial advocacy

¹ Defendants respectfully submit that NYPD is not a suable entity.

training, and simultaneously attempting to defend my caseload. I respectfully apologize for any inconvenience caused by the delay.

Defendants respectfully submit that the delay in responding to the amended complaint was neither willful nor undertaken in bad faith. Moreover, defendants submit that they have a meritorious defense to plaintiff's claims, in that any force used upon plaintiff was reasonable in light of the fact that plaintiff was in possession of a loaded gun during his arrest. Furthermore, defendants submit that any prejudice to plaintiff caused by the delay is minimal, as the delay has not been shown to make discovery more burdensome or contribute to the deterioration of evidence. See Davis v. Musler, 713 F.2d 907, 917 (2d Cir. 1983). Under these circumstances, defendants submit that entry of default judgment would be improper. Indeed, "[t]he Second Circuit strongly prefers dispute determination on the merits and directs district courts to resolve any doubts regarding ... default in favor of a trial on the merits." Springs v. Clement, 202 F.R.D. 387, 394 (E.D.N.Y. 2001) (citing Shah v. New York State Dep't of Civil Service, 168 F.3d 610, 613 (2d Cir. 1999); Cody v. Mello, 59 F.3d 13, 15 (2d Cir. 1995); Enron Oil Corp. v. Dikuvara, 10 F.3d 90, 95 (2d Cir. 1993)).

I would like to assure the Court that we are attempting to move forward in this litigation as expeditiously as possible, and that the delay in responding to the amended complaint was due to an unintentional oversight. Accordingly, it is respectfully requested that the Court grant the within request to file the enclosed Answer to the amended complaint.

Thank you for your consideration in this regard.

Respectfully submitted,



Bradford C. Patrick
Assistant Corporation Counsel
Special Federal Litigation Division

Enc.

CC: BY MAIL

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8/18/08
Inasmuch as the docket sheet maintained by the Clerk of Court indicates that, as of this date, the Plaintiff has not made any filing in connection with the Court's June 23, 2008 order, and the time for doing so has elapsed, the instant application, by the defendants, is granted. On or before August 15, 2008, the defendants shall serve and file their answer to the amended complaint.

SO ORDERED:
(Kevin Nathaniel Fox)

KEVIN NATHANIEL FOX, U.S. M.J.